

# ZONINGPRACTICE

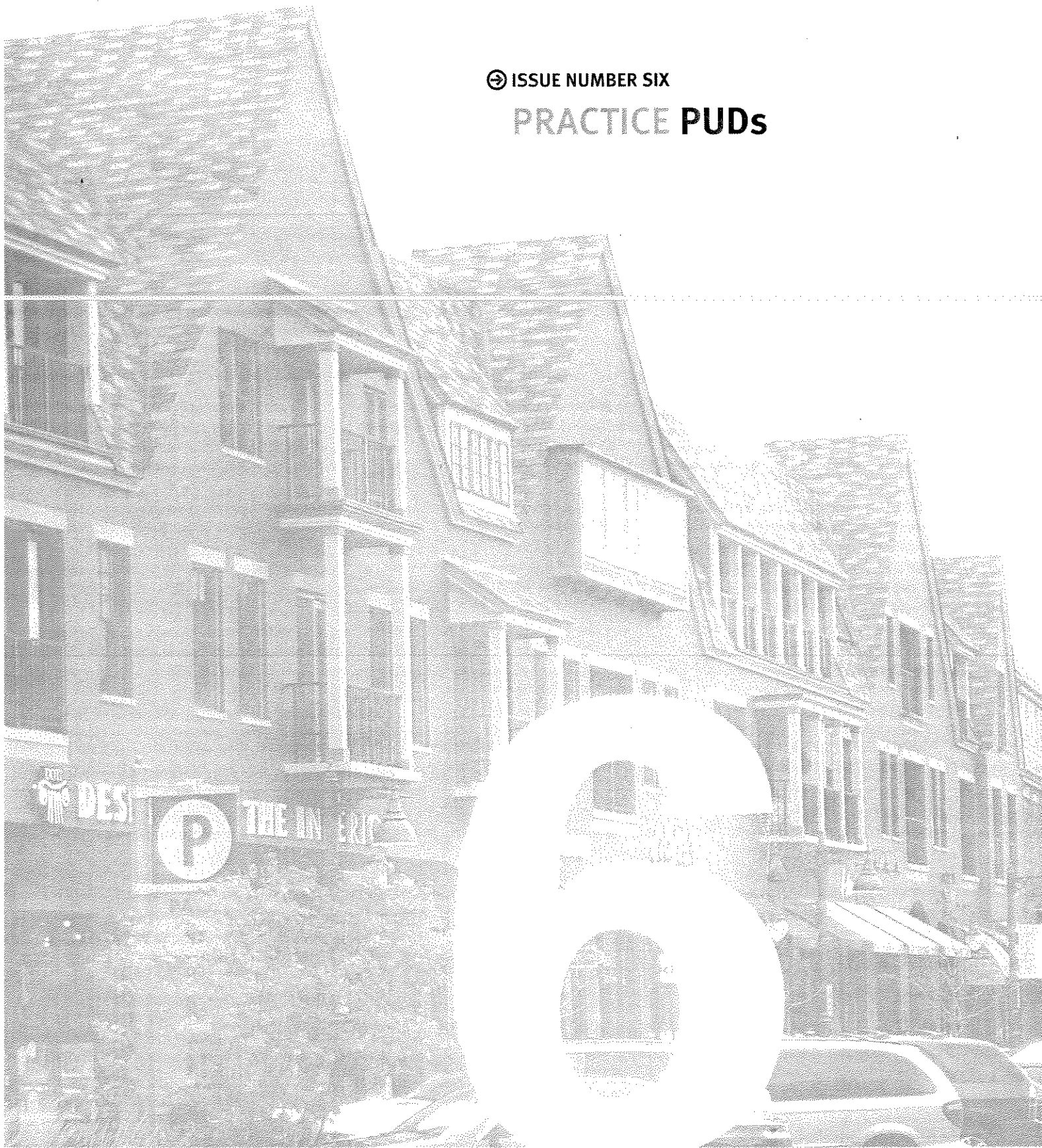
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## PRACTICE PUDs



# Planned Unit Developments and Master Planned Communities: Review and Approval Processes

By Daniel R. Mandelker, FAICP

A local government must adopt a process in which it approves planned unit developments and master planned communities.

The procedures for PUD review and approval are now fairly standardized and resemble procedures for other land-use approvals, such as subdivision approvals. The critical step is the approval of the development plan, which contains a map and text that govern project development. The planned unit development ordinance contains approval standards the legislative body must apply when it decides whether to approve a development plan. Depending on how the ordinance is written, the development plan can supplement an underlying zoning ordinance, or it can provide an independent set of regulations for the planned unit development.

Local governments use three different procedures for approving development plans:

- A three-step procedure beginning with the submission and approval of a generalized concept or sketch plan, followed by the successive submission and approval of a detailed preliminary and final development plan. A development plan may be adopted for the entire project, or it may be adopted in phases for each phase. The final development plan is simply the final confirmation of what was in the preliminary plan.

- A two-step procedure that omits the concept or sketch plan and requires only the approval of a detailed preliminary and final development plan. For phased developments, the approval of a detailed development plan for the entire project is followed by more detailed site plans for each phase.

- The submission of a final development plan without the submission and approval of a preliminary development plan.

This issue of *Zoning Practice* reviews each of the steps in the rezoning process for planned unit developments and recommends ordinance provisions that can enact them. The approval of a development plan requires decisions by the legislative body and the planning commission.

## OVERLAY DISTRICT OR NEW BASE DISTRICT?

The local government should choose between designating the planned unit development district as an overlay district that provides regulations supplementary to the underlying zoning district, or as a new base district that displaces the zoning in the underlying district. In either case, the municipality will approve a development plan that contains maps and text with the regulations that apply to the planned unit development. The second approach is preferable, though overlay zoning may be appropriate if only marginal changes from the underlying zoning regulations are contemplated.

## APPROVAL OF DEVELOPMENT PLAN AT TIME OF REZONING

In some instances, the approval of a development plan for a planned unit development occurs following the adoption of a planned unit development district. A community may prefer to require the approval of a development plan at the same time it approves the planned unit development district so it will know at that time what kind of development it has allowed.

## REZONING WITH CONDITIONS

In some jurisdictions, a rezoning for a planned unit development district is accom-

panied by conditions (or stipulations) adopted by the legislative body. These conditions can be quite extensive. Because they are negotiated on a case-by-case basis, they are not specified in the ordinance and can cover any issue that affects the planned unit development. The relationship between the rezoning conditions and the development plan is important. The rezoning conditions can provide that the development plan is incorporated into the rezoning ordinance as a condition. Other rezoning conditions would then supplement the plan or at least not contradict it.

Another option for the approval of a planned unit development is to authorize its approval as a special or conditional use or permit. This is one of the options provided by the American Planning Association's *Growing Smart Legislative Guidebook*. Approval as a special or conditional use is practicable, however, only for a planned unit development on a limited scale that does not require substantial changes in land use and intensities. An example would be a residential cluster housing planned unit development that does not require an increase in density or change in use. The board of zoning appeals, which usually approves conditional uses, does not have the authority or expertise to approve large-scale developments that require major planning and land-use decisions.

Approval of a planned unit development as a subdivision is also possible in limited circumstances in which there is no change in use or density. The *Legislative Guidebook* also includes a general provision

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This issue of *Zoning Practice* is derived from portions of Chapter 3 of Daniel R. Mandelker's Planning Advisory Service Report 545, *Planned Unit Developments*.

for the approval of planned unit developments as subdivisions. Coordination with approval under the subdivision is required if planned unit developments are approved under the zoning ordinance.

### THE ZONING PROCESS

**The preapplication conference.** Many communities begin the planned unit development review process with a preapplication conference. It can be mandatory or optional. This is desirable and standard practice in any land-use procedure. It can be especially helpful in planned unit development review when a major project is contemplated that requires complex planning and design decisions. Planned unit development ordinances contain a variety of preapplication conference requirements. Some simply require a conference with planning staff, and some are more elaborate and require comments by planning staff that the applicant must take into account. An informal meeting with the legislative body may also be required and can be helpful, especially for a master planned community.

**The concept or sketch plan.** Many planned unit development ordinances authorize or require the submission of a concept, sketch, or outline plan to begin the application review process. This kind of plan is sometimes called a "bubble" plan because it identifies uses and densities in circles, or "bubbles," on the plan map without additional detail. The purpose of requiring a concept plan is to give the legislative body an

### RECORDKEEPING

The approval of numerous planned unit developments and master planned communities in a community can create serious recordkeeping problems that can make the monitoring of planned unit developments and enforcement of the planned unit development ordinance difficult. A planned unit development can produce a large number of documents, depending on how it is approved. These can include:

- ◆ Approved concept and development plans
- ◆ A design handbook or plan in addition to the final development plan
- ◆ Building permits and certificates of compliance with the final development plan
- ◆ Enforcement actions, if any
- ◆ Resubdivisions, resales and leases of all or part of the project
- ◆ Dedications of land, easements, or other documents created to preserve and manage common open space and natural resource areas. This can include documents associated with a transfer of development rights program, if there is one.
- ◆ Exactions or impact fees for public facilities
- ◆ Agreements concerning the provision of public services, such as water supply and sewerage, highways and highway access, and other public facilities
- ◆ The rezoning ordinance
- ◆ Conditions attached to the rezoning ordinance
- ◆ A development agreement
- ◆ Private restrictions and covenants that apply to the planned unit development
- ◆ Documents associated with approval under the subdivision ordinance
- ◆ Documents concerning the creation of special development or other district to provide public services and facilities

opportunity to approve the critical elements of a planned unit development that require legislative approval. It usually is not possible to vest a right to develop at the concept plan stage, however, because the plan does not contain enough detail to allow vesting. A concept plan will be processed like a normal zoning amendment, with reference to the planning commission for comment if this is the procedure that is established locally. The concept plan is especially useful for large master planned communities that will be built in phases over a substantial period of time.

#### **Approval and effect of concept plan.**

Provision must also be made for the approval and effect of the concept plan:

- (1) The planning commission shall forward a recommendation to the [legislative body] that the concept plan be approved as submitted, approved with modifications, referred for further consideration, or disapproved. Upon receipt of the recommendation of the planning commission, the [legislative body] shall determine whether or not to [adopt a proposed zoning change to establish the proposed planned unit development district and] approve the concept plan.
- (2) Approval of the rezoning and related concept plan shall establish the basic uses, densities, and intensities for the planned unit development in conformity with the plan as approved, which shall be recorded by the zoning administrator as an integral component of the planned unit development district regulations, but the concept plan shall be conditioned upon approval of a final development plan, and shall not make permissible any of the uses, densi-

ties or intensities as proposed until a final development plan is submitted and approved for all or a portion of the area covered by the concept plan. (Adapted from Madison, Wisconsin)

This provision includes two alternatives. If the bracketed language is included, the rezoning and concept plan are approved at the same time. If the bracketed language is omitted, there will have been a prior adoption of a rezoning for a planned unit development district and only the approval of the concept plan will be necessary at this stage. This provision also makes it clear that the concept plan adoption establishes the basic uses, densities, and intensities, but that a final development plan must be approved before the development can go forward.

**Preliminary development plan.** The development plan is a detailed plan of development equivalent to a site plan and must have enough detail to serve as the regulations that apply to the planned unit development. In some jurisdictions this is known as a regulating plan. If the planned unit development district is an overlay district, the text and map of the development plan must be carefully correlated with the provisions of the underlying district. The development plan must also be detailed enough to provide what is known as an "entitlement," which is a vesting of the uses, densities, and other elements of the project that are included in the plan. Vesting can be handled through a development agreement or a vesting statute or ordinance, and is discussed below.

The preliminary development plan is preliminary only in that it is the first step in the approval of a plan for the planned unit development. If a concept plan has been approved, the planning commission usually has the responsibility of approving the preliminary development plan. If not, the legislative body approves the preliminary development plan and may approve it at the same time it approves the rezoning for the planned unit development. The second step is the approval of the final development plan, which the planning commission approves if it conforms substantially to the approved preliminary development plan. This is a two-step procedure that is borrowed from the subdivision ordinance. If the planned unit development, like a master planned community, is to be developed in phases, it may be necessary to adopt a

development plan for each phase of the development that implements the project development plan in more detail.

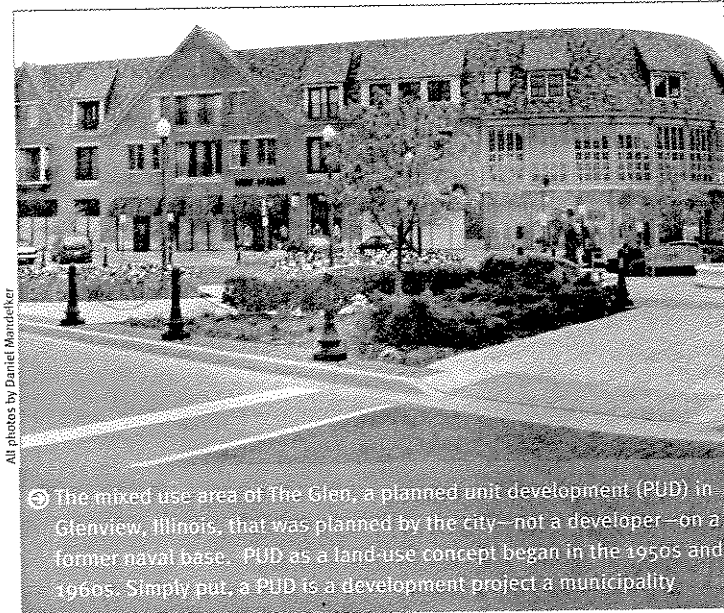
Integration with the subdivision ordinance is another critical issue in the review of the preliminary plan. Subdivision approval requires detailed platting and engineering for streets and other public facilities that may not be possible or desirable at the development plan stage, especially when the development will be built in phases. For this reason, most ordinances do not require planned unit development plans to have this information, and coordination with subdivision approval is necessary.

For all these reasons, the preliminary development plan is a critical document. It must include, in detail, information on all of

requirement that adequate public facilities be available. These may be handled by separate ordinances or may be specified in the planned unit development ordinance. In either case, the preliminary development plan should contain information about these programs if they apply.

**Master development plan followed by site plan.** The preliminary development plan, once approved, is followed by a final development plan that is approved if it is in substantial compliance with the preliminary development plan. For large developments, such as master planned communities that will be developed in phases, it is necessary to provide for a master development plan followed by more detailed site plans for each stage.

This technique substitutes the master develop-



⑤ The mixed use area of The Glen, a planned unit development (PUD) in Glenview, Illinois, that was planned by the city—not a developer—on a former naval base. PUD as a land-use concept began in the 1950s and 1960s. Simply put, a PUD is a development project a municipality



the requirements in the planned unit development ordinance. It must also include information on requirements included in other ordinances, such as a landscaping ordinance, if this ordinance is the basis for landscaping in planned unit developments. Once approved, it becomes the regulatory plan for the development.

The ordinance may include other requirements, such as an affordable housing jobs/housing balance, for which information should be included in the preliminary development plan. There may also be other programs that apply to planned unit developments, such as a transfer of development rights program for natural resource areas, or a

development plan for a concept plan, and splits project details between the master development plan and site plans. They take the place of a final development plan for the entire project, and are approved if they are in substantial compliance with the master development plan.

**The specific plan.** Arizona and California authorize by statute the adoption of a "specific plan" that many communities use as a substitute for a project development plan. In California, the specific plan and other zoning actions for planned unit developments must also go through the environmental review procedures required by the California Environmental Quality Act.

Some municipalities where specific plans are authorized have regulations providing for the preparation and adoption of a specific plan for planned unit developments. Since the specific plan is the equivalent of the development plan, the ordinance can provide that uses, site development requirements, and densities are governed by the specific plan.

#### PROCEDURES FOR THE REVIEW OF DEVELOPMENT PLAN APPLICATIONS

Under some ordinances the legislative body adopts a rezoning for a planned unit development district and also approves the development plan, either at the time of rezoning or later. Alternatively, the decision whether to approve the development plan is usually given to the planning commission. This deci-

**The completeness determination.** The ordinance should contain a requirement for a completeness determination so that the local government at some point must accept an application as complete, and so the applicant will be given direction on what is required if the application is rejected as incomplete. A completeness requirement is especially important for planned unit developments, which may need to meet complex regulatory requirements.

**Notice and hearing.** A decision on a planned unit development application is made following a record hearing held after published notice. There may be a statement in the notice that a record hearing will be held, for example. The hearing notice may also do the following:

no cost at least [seven] days prior to the record hearing, and will be provided at actual cost.

**Findings and decision.** Adequate findings are very important, especially for a development that can be as complex as a planned unit development.

The planned unit development ordinance can also state what action an applicant must take if an application for a planned unit development permit is conditionally approved:

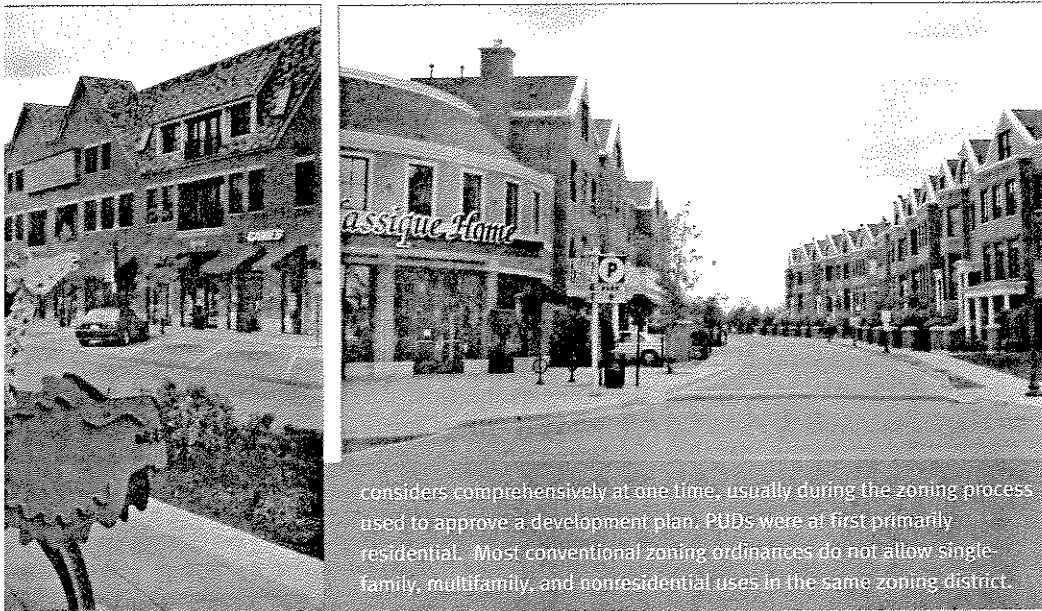
If an application for the approval of a preliminary development plan is conditionally approved, the applicant shall have 90 days from the date of planning commission action granting conditional approval to submit a revised application to the planning staff. If the planning staff determines that the revised application complies with the conditional approval, it shall forward it to the planning commission for a public hearing.

**Time limits.** A requirement for timely decisions as well as the requirement for a completeness decision should minimize the delays that can occur in decision making and that can create difficulties in the approval process for planned unit developments.

**Final development plan.** Once the preliminary development plan is approved, the applicant will submit a final development plan to the planning commission for approval. The purpose of reviewing the final plan is to ensure it includes all the approved elements of the preliminary development plan, and that no substantial changes have been made. Approval can be by the planning commission unless there have been substantial changes, which the ordinance can spell out. A public hearing is required on the approval of the final plan, and is also required if a revised final development plan is submitted after disapproval.

The jurisdiction can issue building permits and a certificate of occupancy once it approves the final development plan.

**Coordination with subdivision regulations.** If a planned unit development requires the subdivision of land, which is likely in many instances, it will also require review under the subdivision ordinance. Coordinating these reviews can be difficult. Coordination at the concept plan stage is not possible because the concept plan does not include enough detail to allow a review of compliance with the subdivision ordinance. Coordination is also difficult even at the preliminary development plan stage



considers comprehensively at one time, usually during the zoning process used to approve a development plan. PUDs were at first primarily residential. Most conventional zoning ordinances do not allow single-family, multifamily, and nonresidential uses in the same zoning district.

sion is made in a quasi-judicial process that requires a noticed public hearing, findings of fact, and a written decision. Because a review process of this type is needed for all development applications, its inclusion elsewhere in the zoning ordinance is preferable, and the planned unit development ordinance can cross-reference to it. If the local government has a unified development code that includes a provision for planned unit developments, the review process will be part of that code. Some planned unit development ordinances contain their own review procedures for development plan applications, and this section discusses the elements that should be part of those procedures.

- List the land development regulations and goals, policies, and guidelines of the local comprehensive plan that apply to the application.
- State that a failure to raise an issue at a record hearing—in person, or by letter—or the failure to provide statements or evidence sufficient to afford the local government an opportunity to respond to the issue precludes an appeal to the appeals board based on that issue, unless the issue could not have been reasonably known by any party to the record hearing at the time of the record hearing.
- State that a copy of any staff reports on the application will be available for inspection at

All planned unit development districts should be recorded on the zoning map, and all documents associated with the planned unit development, including the development plan, should be filed with a recordkeeping office in the land-use agency. These documents should include agreements with other public agencies, such as the highway agency, which may not be part of the public record for the planned unit development. Computer and GIS programs can be installed that can organize and maintain these documents. Staff must, however, provide overview and supervision if this system of monitoring is to be effective.

The following is an outline of a possible recordkeeping:

- ◆ **Assign** each planned unit development a planning case number, create a project file, and place any documents relating to the development in that file.
- ◆ **Record** all planned unit development districts on the zoning map.
- ◆ **File** all documents associated with the planned unit development in a public recordkeeping office in the land-use agency.
- ◆ **Record**, to the extent possible, the final development plan and any associated documents, such as subdivision plat and common open space documents, with the recorder's office so they will show up in the chain of title.
- ◆ **Consider** site plan review for developments within the planned unit development as they occur.
- ◆ **Monitor** development of the project and do inspections through building, grading, and other permits for compliance with the development plan and other requirements.
- ◆ **Install** a computer program to keep track of project development and relate it to building permits.

because this plan does not usually include the engineering details for streets and other facilities that are required by the subdivision ordinance. Many developers prefer not to provide these details at this stage, and prefer to deal with subdivision issues at a later stage under the subdivision ordinance. Engineering plans of this kind are expensive to produce, and there may not be enough commitment to the project even at the preliminary development plan approval stage to justify their preparation.

#### DEVELOPMENT AGREEMENTS

It is common in many areas for local governments to execute development agreements with developers of planned unit developments, especially for master planned communities. There are a number of reasons for doing this. One of the most important is that, unlike a rezoning ordinance or a development plan, a development agreement establishes obligations that cannot be modified unless the agreement authorizes this. Another is that the agreement can give the developer an entitlement, or a vested right, to complete the development under the land-use regulations in effect at the time the development plan was approved. Subsequent changes in the regulations would not apply. The agreement can also establish other obligations, including developer exactions, allowable uses and other project elements, the formation of special districts to finance infrastructure, and the preservation of natural resources. A development agreement can be long—60 to 70 pages or more. Coordination with provisions in the

development plan and with conditions attached to the rezoning, if any, is necessary.

#### DEVELOPMENT PLAN AMENDMENTS

Change is inevitable, and one of the most important issues in the drafting of ordinances for planned unit developments is to provide

authority for the amendment of development plans. Changes in the market, or changes in the developer's objectives for the development, can require changes in an approved plan. Change can also occur because neighbors or residents who move in early in the project may object to nonresidential development that was in the plan from the beginning but which they believe is not compatible with their residential living environment.

A restrictive approach to amendments would limit them only to unforeseen circumstances. This type of provision does not allow for changes required by proposals to modify the development. The usual approach for an ordinance that authorizes this kind of change is to distinguish between major changes, which require new legislative action, and minor changes that do not. An ordinance can simply state that a change is major if it is "substantial," or it can provide a list of changes and indicate which are substantial and which are not. A detailed listing is preferable because it removes the need to exercise discretion on what is and what is not "substantial," and provides predictability on what can and cannot be changed and how such determinations will be made. Minor changes can be approved administratively by the planning director and staff, or they can be approved by the planning commission. If approval is required by the planning commission, an application should be required but the completeness, notice, hearing, and decision procedures need not apply. Chapter 10 of the *Legislative Guidebook* has a provision in for administrative review without a record hearing that can be used for these decisions.



③ The Boulevard development in St. Louis, Missouri. Developments like this can be done as of right in many communities. Placing PUDs on infill sites such as this means the community can establish design requirements in its land-use regulations for the area.

Changes in permitted uses and in the density and intensity of use are obvious candidates for inclusion in a list of changes that should be listed as major, though any element in the development plan that is essential to the character of the planned unit development should be included, such as open space, traffic and pedestrian circulation systems, design elements, and the jobs/housing ratio, if one is included.

#### FAILURE TO DEVELOP AND ZONING REVERTER

Problems will arise if the planned unit development is not developed, or if development begins and is not completed. It is not typical to require a developer to provide bond or security to guarantee completion of a development, though some communities have adopted requirements of this type. To deal with this problem, the ordinance usually includes a period of time during which the development must be completed, either for the entire development or for each phase if development is to be in phases. The ordinance may then require the reversion of the zoning for the planned unit development zoning to its original zoning if the planned unit development is not completed during the designated time period.

Many ordinances provide for a reverter to the original zoning without an additional hearing and action by the legislative body, but this procedure is doubtful. Most courts hold that an automatic reverter clause of this type is invalid. An ordinance should require notice and hearing and a decision by the legislative body on a rezoning as the basis for terminating the zoning for a planned unit development.

#### CONTROL FOLLOWING COMPLETION

Once a planned unit development has been completed, any land use or additional development should be controlled by the approved development plan. Failure to include this provision may mean the developer can ignore the development plan in its development of the project (see, e.g., *Cherokee County v. Martin*, 559 S.E.2d 138 (Ga. 2002), in which the developer was allowed to build an apartment complex not shown on the plan because the county did not specify compliance with the site plan as a condition of PUD zoning).

#### SUBDIVISION AND RESALE

Problems of continuing control are created if a planned unit development is subdivided

after the final development plan has been approved, or if all or part of the development is sold or leased. These events may create compliance problems. Subdivision may sever areas of the project that do not, standing alone, comply with the development plan.

It is important in this situation to distinguish between existing and new development. Severing part of a developed project through subdivision, sale, or lease should not create compatibility problems at the new perimeter or other problems because the development plan will still apply. New development is a different matter and needs attention in the ordinance. The density of new development in the severed area, for exam-

The approval of numerous planned unit developments and master planned communities can create serious recordkeeping problems, making the monitoring and enforcement of the PUD ordinance difficult.

ple, must not be allowed to increase the density authorized for the entire development. Nor should it result in a decrease in common open space or preserved natural resource areas.

Part of this problem can be handled in the subdivision ordinance, which can require subdivision approval for the resubdivision of a planned unit development, or its resale or lease if this creates a new subdivision. This ordinance can also provide that the planning commission shall not approve a resubdivision, sale, or lease unless the newly subdivided, sold, or leased parcel meets all of the requirements of the ordinance and complies with the development plan, but this restriction may not be practicable in many instances.

Another alternative is to make the final development plan the controlling document for the entire project, including any resubdivided, sold, or leased parcel.

#### CONCLUSION

More than 20 percent of all homes in this country are built by the nation's top 10 builders. This is an amazing statistic. It highlights a growing concentration in the home building industry that is changing the shape of land development because large builders build at a large scale. Planned unit developments and master planned communities now make up the largest share of new development in many suburban areas and contribute to the growing demand for infill development in urban centers. In California alone, one law firm had 204,000 units of housing approved in PUDs and master planned community projects when interviewed for this report. These trends call for a new look at PUDs and master planned communities as a zoning strategy.

The mixed use area of The Glen, a planned unit development in Glenview, Illinois, sited on a former naval base. Photo by Daniel Mandelker.

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